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In the Supreme Court of the United States

OCTOBER TERM, 1991

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent and his amici all but ignore the central features of this case. Respondent is a member of the Provisional Irish Republican Army (PIRA), a terrorist organization. He was convicted of possessing explosives in connection with his PIRA activities and of murder and related crimes in the United Kingdom in 1980. Respondent then engineered an armed escape and entered the United States illegally as a fugitive in 1982. At his deportation hearing, respondent waived his right to apply for asylum and withholding of deportation, and sought to be deported immediately to Ireland—before the effective date of a Supplementary Treaty that subjected him to extradition from the United States to the United Kingdom. In a complete about-face, respondent now seeks to have his deportation proceedings reopened and to apply for the special relief (asylum and withholding of deportation) he previously waived. In response to this attempt

to manipulate the administrative process, the Attorney General properly concluded that enough is enough.

First, respondent identifies no changed circumstances warranting the extraordinary remedy of reopening. *Second*, nothing in the text or background of Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. 1158 (a), barred the Attorney General from considering this Nation's opposition to terrorism and related foreign policy concerns in deciding that respondent should be denied asylum in any event. *Third*, Judge Sprizzo's conclusion in 1984—which we think was gravely wrong—that respondent's offenses were "political" (and therefore did not subject him to extradition) has been overruled by the Supplementary Extradition Treaty with the United Kingdom.

I. All else aside, Attorney General Thornburgh did not abuse his discretion under applicable regulations and *INS* v. *Abudu*, 485 U.S. 94, 104-111 (1988), by denying respondent's motion to reopen on the ground that he did not identify any new evidence or changed circumstances that warranted that special remedy. Pet. App. 62a-78a. Respondent relies (Br. 101-110) solely on the Extradition Act that became effective in Ireland on December 1, 1987. Section 3 of that Act lists offenses (including those involving automatic firearms and hostage-taking) that will not be regarded as political crimes within the meaning of Ireland's Extradition Act of 1965. J.A. 97-98. In respondent's view, the 1987 Act made it clear that if he was deported to Ireland, he would, in turn, be extradited to the United Kingdom. Respondent's reliance on the 1987 Act is fundamentally flawed.

Under Attorney General Meese's decision of June 9, 1988 (which the Second Circuit sustained and respondent does not challenge), respondent is to be deported to the United Kingdom, not Ireland. As a result, any change in *Irish* law is simply immaterial. Pet. App. 74a. It is true, as respondent points out (Br. 106-107), that when he filed his motion to reopen on December 3, 1987, the BIA had

approved his designation of Ireland and ordered him deported to that country. But respondent fails to note that approximately one month before he filed his motion to reopen, Attorney General Meese had granted the INS's request to review the BIA's order. Attorney General Meese thereafter reversed the BIA's decision and ordered respondent deported to the United Kingdom. It was only after Attorney General Meese's order that Attorney General Thornburgh ruled on respondent's motion to reopen. At that point, it was hardly an abuse of discretion for Attorney General Thornburgh to conclude that any change in Irish law was no longer material (even assuming that it once was), and hence did not warrant reopening of the deportation proceedings. Respondent in fact concedes (Br. 108) that the 1987 Extradition Act "receded in significance" at that point.[1]

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[1] Respondent asserts (Br. 109) that the Meese decision "made the need for the relief sought through the motion [to reopen] all the more acute," since it "insured [respondent's] direct return to the country where he feared persecution." But he does not argue that the Meese decision itself warranted reopening. See Br. in Opp. 9-10, 16-17.

Amicus ACLU does contend (Br. 11-13) that the Meese decision required reopening. Attorney General Thornburgh correctly rejected that notion. Pet. App. 65a-67a. Respondent was aware of the INS's opposition to his designation of Ireland (and of the interest in that question at the "highest levels of government") when he waived his right to apply for asylum and withholding of deportation on September 12, 1986, which was *before* the immigration judge ordered him deported to Ireland on September 19, 1986. *Id.* at 66a, 156a-159a; J.A. 32. Attorney General Meese's rejection of respondent's designation was nothing more than the final decision in the same proceeding. As Attorney General Thornburgh explained, if an adverse final decision were sufficient to require reopening (especially to allow the alien to apply for relief he previously waived), "there could never be finality" and "the regulatory process could be manipulated at will." Pet. App. 67a, 81a. The ACLU objects (Br. 12-13) that the result will be to require an alien who wants to avoid deportation to a country where he fears persecution to both request deportation to a third country and apply for asylum and withholding of deportation. But all issues concerning the alien's deportation *should* be resolved in a single proceeding. Although in this case the

Quite apart from Attorney General Meese's order, a change in *Irish* law could have no bearing on any request by respondent, under Section 243(h) of the Act, 8 U.S.C. 1253(h), for withholding of deportation to the *United Kingdom*. That Section bars deportation to a particular country if the Attorney General finds that the alien's life or freedom would be threatened "in such country" for a prohibited reason. Respondent has alleged that he would be persecuted in the United Kingdom. Before the Meese decision, as after, Irish law was irrelevant to a claim that the Attorney General should not deport him to "such country." [2]

Moreover, Attorney General Thornburgh found, after thorough analysis, that the 1987 Act did *not* materially increase the likelihood that respondent would be extradited from Ireland to the United Kingdom, because the "political offense" exception under the 1965 Irish Extradition Act had already been significantly narrowed by judicial construction. Pet. App. 70a-73a. Respondent makes no effort to refute this conclusion. See Resp. Br. 106-107. Significantly, moreover, the Attorney General noted that when respondent waived asylum and withholding of deportation and sought to be deported to Ireland, respondent himself argued that " 'decisions of the Irish Supreme Court are viewed as having vitiated the political offense exception [in the 1965 Irish Extradition Act], thereby removing any obstacle to respondent's extradition from Ireland to the United Kingdom. *See, e.g., McGlinchey* v. *Wren*, 3 Ir. L. Rep. Monthly 169 (1982) [[1982] I.R. 154].' " [3] Even if respondent were now able to show that the 1987 Act did substantially change Irish law, that change would be immaterial in *this* case, since even prior to the 1987 Act, respondent represented (and therefore presumably believed) that he was already subject to extradition from Ireland to the United Kingdom, but nevertheless sought to be deported to Ireland.

Finally, respondent does not dispute the Attorney General's finding that even if the 1987 Act did marginally increase the risk that he would be extradited from Ireland to the United Kingdom, that consequence was entirely foreseeable when respondent designated Ireland as the country of deportation. Ireland had committed itself in the Anglo-Irish Agreement of November 15, 1985, to accede as soon as possible to the European Convention on the Suppression of Terrorism (which excluded the same offenses from the category of "political" crimes), and it signed the Convention in February 1986—more than six months *before* respondent waived his right to apply for asylum and withholding of deportation in an effort to be deported immediately to Ireland. Pet. App. 67a-68a. Nor does respondent dispute the Attorney General's conclusion that the foreseeability of any change in Irish extradition law weighed against reopening because it confirmed that respondent had assumed the risk that "the move then underway to obtain ratification of Ireland's treaty with the United Kingdom would prove successful." *Id.* at 80a.[4]

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circumstances warranted rejection of respondent's designation of Ireland, INS presumably would promptly agree to the alien's designation in the absence of such circumstances.

[2] But cf. *Amanullah & Wahidullah* v. *Cobb*, 862 F.2d 362, 367-368 (1st Cir. 1988). Respondent's claim to the broader relief of asylum of course was also predicated on an alleged threat of persecution in the United Kingdom, not Ireland. For this reason, any change in Irish extradition law was likewise immaterial to the underlying basis for his asylum claim even before the Meese decision.

[3] Pet. App. 70a-71a (quoting respondent's brief to the BIA); see also *id.* at 70a n.25, 71a; *Shannon* v. *Flanning*, [1984] I.R. 569 (Ir. S. Ct.); Connelly, *Non-Extradition for Political Offenses: A Matter of Legal Obligation or Simply a Policy Choice*, 1982 Irish Jurist 59.

[4] Amicus ACLU suggests (Br. 13-14) that if changed circumstances must be unforeseeable, an alien would have to anticipate political developments in a foreign country that would increase the threat of persecution. Because there is no allegation here of such changes in the United Kingdom, the relevance of foreseeability in that setting is not involved. This case presents the distinct question of whether reopening is required by a change in the *law* in a for-

II. Even if the Court disagrees with our first point, the order denying reopening should be sustained on the independent ground that the Attorney General properly decided that respondent would not in any event be granted asylum or withholding of deportation.

A. Respondent does not challenge two of the four factors cited by the Attorney General in deciding to deny asylum—namely, that "respondent knowingly and intentionally waived his claim to asylum," and that "respondent's membership in and assistance of the PIRA in its acts of persecution, and the nature and number of his criminal acts in general, * * * suggest that he is not deserving of equitable relief." Pet. App. 82a. Instead, respondent contends that it was improper for the Attorney General to rely on the other two factors: (1) that deportation of respondent would advance the "important policy" of the United States "that those who commit acts of violence against a democratic state should receive prompt and lawful punishment," and (2) that "the United States Government, through the State Department, has specifically determined that it is in the foreign policy interest of this country that respondent be deported to the United Kingdom." *Ibid.* Respondent is wrong.

1. The humanitarian purposes of asylum itself, as well as the national security interests of the United States and the safety of its citizens, would be undermined if the Attorney General were required to insulate his asylum decisions from consideration of the Nation's opposition to terrorism and the policy that those who commit acts of violence against a democratic state should receive prompt and lawful punishment. Respondent in fact does not contend that Section 208 of the Act itself precluded the Attorney General from considering the murder and related crimes of which respondent was convicted in the United

eign country to which the alien *asked* to be deported. Pet. App. 74a. The Attorney General reasonably concluded that an alien who requests to be deported to a particular country assumes the risk that a foreseeable change in the law will occur there. Cf. *Reed* v. *Ross*, 468 U.S. 1, 12-16 (1984).

Kingdom.[5] Instead, respondent argues (Br. 38-52) that he may be returned to the United Kingdom to serve his sentence for those crimes only by way of extradition, not deportation. See also Int'l Human Rts. Group Br. 34-41. There is no support for that novel proposition. Our immigration laws have long provided for exclusion and deportation of aliens who committed crimes abroad. See 8 U.S.C. 1182(a)(9) (1988) (crimes involving moral turpitude); 8 U.S.C. 1182(a)(2) (criminal and related grounds) and 1182(a)(3)(B) (terrorist activities), as amended by the Immigration Act of 1990, § 601, 104 Stat. 5067, 5069. It has never been suggested that extradition is the only way those aliens may be removed from the United States.

As this Court made clear in the very decision upon which respondent relies (Br. 45, 47), extradition and deportation "are different things, and have different purposes." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 709 (1893). Extradition "is the surrender to another country of one accused of an offence against its laws," to be tried and, if found guilty, punished, *ibid*; it occurs

[5] Section 515 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 5053, now *requires* that an alien in respondent's position be denied asylum. It adds a new paragraph (d) to Section 208 to provide that "[a]n alien who has been convicted of an aggravated felony, notwithstanding subsection (a), may not apply for or be granted asylum." The term "aggravated felony" is defined in 8 U.S.C. 1101(a)(43) (as amended by the 1990 Act, § 501, 104 Stat. 5048), to mean, *inter alia*, "murder" and "any illicit trafficking in any firearms or destructive devices," including any such offense that violates foreign law. Respondent is not barred by this new provision because the term "aggravated felony" includes only those foreign offenses that were committed on or after the effective date of the 1990 Act. § 501, 104 Stat. 5048. But the fact that Congress has provided that the Attorney General *must* deny asylum applications filed by such aliens in the future reinforces the conclusion that the Attorney General did not err in relying on respondent's convictions for murder and possession of explosives in denying him asylum as a discretionary matter. Compare *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 78 (1957).

only upon a request by the foreign government concerned. Deportation, by contrast, "is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare," *ibid.*; it is not dependent upon a request by a foreign government or the availability of extradition, and it may proceed without regard to whether the alien will be tried or punished abroad. As a result, if an alien is ineligible to remain in the United States under our immigration laws and has been charged with or convicted of a crime in another country that is covered by an extradition treaty, he is subject to *both* deportation and extradition. Otherwise, the United States would be required to tolerate the continued presence of the alien, in violation of the Immigration and Nationality Act, if the foreign government concerned declined to request extradition. The central point of *Fong Yue Ting* is that the power to expel aliens is a fundamental attribute of sovereignty. 149 U.S. at 704-714. That power is not abrogated in this case simply because the foreign government concerned *does* intend to try or punish the alien (or because the United States supports that intention).

Contrary to respondent's contention (Br. 38-39, 42-44, 47-48, 81-82, 92), there is no basis for a different result here because Judge Sprizzo, in 1984, denied an application for a warrant to extradite respondent to the United Kingdom. *In re Requested Extradition of Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984). Respondent concedes (Br. 42, 51-52) that Judge Sprizzo's ruling would not bar a judge from entertaining a new request for extradition, since it was not appealable and has no res judicata effect.[6] *A fortiori*, the denial of extradition does not bar the Attorney General from deporting respondent under

[6] See *Collins* v. *Loisel*, 262 U.S. 426, 429-430 (1923); *Hooker* v. *Klein*, 573 F.2d 1360, 1366-1368 (9th Cir.), cert. denied, 439 U.S. 932 (1978); *In re Mackin*, 668 F.2d 122, 130 (2d Cir. 1981); cf. *Bassing* v. *Cady*, 208 U.S. 386 (1908).

the independent authority of the immigration laws. See pages 17-19, *infra*.

2. In concluding that "it is in the foreign policy interests of this country that respondent be deported to the United Kingdom," Pet. App. 82a, the Attorney General relied on the State Department's representations that (1) because "the United Kingdom is the United States' closest partner in our counter-terrorism efforts," a "[f]ailure to return [respondent] to the United Kingdom could undermine [that government's] confidence in the ability of the United States to cooperate in counter-terrorism efforts of special bilateral concern," and (2) "given the strength of British views on this issue," it "might well prejudice broader aspects of our bilateral relationship." *Id.* at 126a-127a. To state the obvious, terrorism is inimical to the humanitarian premises underlying a grant of asylum; it therefore would be contrary to the purposes of the Refugee Act if the Attorney General were required to ignore the possibility that a discretionary grant of asylum to a convicted murderer and member of a terrorist group would have those adverse consequences. Contrary to respondent's contention (Br. 79-101), Section 208(a) imposes no such requirement.

a. Section 208(a) directs the Attorney General to "establish a *procedure* for an alien physically present in the United States or at a land border or port of entry * * * to *apply* for asylum," and then provides that "the alien *may* be granted asylum *in the discretion* of the Attorney General if the Attorney General determines that such alien is a refugee within the meaning of section 1101(a)(42)(A)" (emphasis added). Nothing in this language imposes *substantive* limitations on the Attorney General's discretion in passing on asylum applications. Respondent and amici rely on the fact that "refugee" is defined in 8 U.S.C. 1101(a)(42)(A) in a geographically and ideologically neutral manner. See Resp. Br. 83-84; Members of Cong. Br. 8; Amnesty Int'l Br. 53-54. But as we have explained (INS Br. 20, 23-27) and this

Court has stressed, "refugee" status simply establishes eligibility for asylum; whether to grant asylum to an alien who satisfies that requirement is expressly committed, without qualification, to "the discretion of the Attorney General." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 428 n.5, 441, 444-445 (1987); *INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984).

Furthermore, the relationship of the national interest and foreign policy concerns to the United States' treatment of refugees is expressly confirmed by the closely related provisions of Section 207, 8 U.S.C. 1157, which govern admission of refugees from outside the United States. Section 207(a)(2) directs the President to set a level of refugee admissions that he determines is "justified by humanitarian concerns or is otherwise in the *national interest*" (emphasis added), and Section 207(a)(3) provides for allocation of those admissions among refugees of "special humanitarian concern to the United States." Section 207(e) requires the President to consult with Congress about these matters and directs him to furnish it with relevant information, including an analysis of the refugee policy's impact "on the *foreign policy interests* of the United States." 8 U.S.C. 1157(e)(6) (emphasis added). Respondent concedes (Br. 87-88) that the "nationai interest" and "foreign policy interests" mentioned in Section 207 are relevant to the discretionary determination of which individual refugees outside the United States will be granted relief under Section 207(c)(1). Those important interests do not become irrelevant when it comes to deciding under Section 208(a) which refugees who have managed to enter the United States (often, as in respondent's case, illegally) should be allowed to remain.[7]

[7] Indeed, if respondent had sought admission under Section 207(c)(1) from outside the United States, the Attorney General reasonably could have found that he was not even eligible for relief: in light of respondent's criminal history and membership in a terrorist organization, the United Kingdom's strong desire that he serve his sentence for murder and related crimes, and the potential for his admission to jeopardize the United Kingdom's cooperation in anti-terrorism efforts and other matters, respondent's admission to the United States (and corresponding avoidance of punishment in the United Kingdom) would not have been indicated on "humanitarian" grounds of any sort, much less ones of "special * * * concern" to the United States. 8 U.S.C. 1157(c)(1). Surely, the Attorney General did not err in taking these same considerations into account in denying respondent relief as a discretionary matter under Section 208(a).

In contrast to respondent, amici Members of Congress contend (Br. 12) that the admission of an individual refugee under Section 207(c)(1) is governed solely by whether he is of "special humanitarian concern to the United States," and that the foreign policy and other national interests that are relevant in fashioning overall refugee policies must be excluded from consideration. Amici misread the Act. An alien must be of "special humanitarian concern to the United States" even to be eligible for admission under Section 207(c)(1). Congress therefore must have intended that *other* factors (such as the "national interest" and "foreign policy interests" mentioned elsewhere in Section 207) may play a role in discretionary determinations of which eligible refugees will be admitted. Because Section 208(a) is drafted in a parallel manner, those same factors also may play a role in discretionary asylum determinations, where the Attorney General deems them relevant.

b. Respondent (Br. 83-84) and amici Members of Con-Congress (Br. 15-26) further contend that the Attorney General's reliance on securing cooperation in combatting terrorism and related foreign policy concerns is inconsistent with the legislative history of the Refugee Act of 1980. Even if we assume, arguendo, that the legislative history could be a source of binding limitations on the exercise of discretion that is conferred by the statutory text in unqualified terms, the background of Section 208 does not suggest that reliance on those factors is impermissible.

Respondent and amici principally rely on the Refugee Act's removal of the geographical and ideological limitations on eligibility for entry from outside the United States under the prior Section 203(a)(7) of the Act, 8 U.S.C. 1153(a)(7) (1976), which was available only to aliens from Communist countries and the Middle East.

That change was accomplished by enactment of Section 207, coupled with the new definition of "refugee" in 8 U.S.C. 1101(a)(42)(A). See INS Br. 29-30. However, those amendments merely broadened the class of eligible aliens; as we have explained, which eligible aliens will actually be admitted is committed to the discretion of the Attorney General—under a framework in which respondent concedes that foreign policy interests are relevant. See page 10, *supra*. Moreover, prior to 1980, eligibility for asylum was governed by a regulation issued pursuant to the Attorney General's authority to administer the Act, 8 U.S.C. 1103, and to parole aliens into the United States, "in his discretion," "for emergent reasons or for reasons deemed strictly in the public interest," 8 U.S.C. 1182(d)(5). See 8 C.F.R. 108.1 (1980); *Cardoza-Fonseca*, 480 U.S. at 427 & n.4, 433 & n.14, 435 n.17; *Stevic*, 467 U.S. at 426 n.20. Under that regulation, any alien was eligible to apply for asylum, without the geographical and ideological limitations that then governed entry from outside the United States. The Refugee Act therefore was not necessary to remove any such limitations on eligibility for asylum. Thus, Attorney General Thornburgh's view of his discretion under Section 208(a) in no way conflicts with the legislative history upon which respondent and amici rely.

The prior asylum regulation "did not explicitly adopt a standard for the exercise of discretion," *Cardoza-Fonseca*, 480 U.S. at 433 n.14, and amici Members of Congress concede (Br. 17) that it permitted foreign policy considerations to be taken into account in deciding which aliens would be granted asylum. Section 208(a) now limits that discretion in one respect: the Attorney General may not *grant* asylum unless the alien qualifies as a "refugee" (*i.e.*, has a "well-founded fear of persecution"). But Congress left the Attorney General's discretion to *deny* asylum unfettered, just as it was under the prior regulation. Because that regulation was based in part on the Attorney General's parole authority—and because Section 212(d)(5) allows the Attorney General to take the "public interest" into account in deciding whether to grant parole—Section 208(a) cannot be read to foreclose the Attorney General from considering important aspects of the public interest in deciding whether to grant asylum.[8]

In sum, as amici Members of Congress acknowledge (Br. 7 & n.5, 22-23), and as its text shows, the principal purpose of Section 208 was to require the Attorney General to establish a "procedure" under which a refugee in the United States or at the border may "apply" for asylum (and to regulate the status of aliens granted that relief). It did not place substantive restrictions on the Attorney General's discretion in passing on asylum applications. See S. Rep. No. 256, 96th Cong., 1st Sess. 9 (1979) ("the substantive standard is not changed"); see also H.R. Conf. Rep. No. 781, 96th Cong., 2d Sess. 20 (1980); H.R. Rep. No. 608, 96th Cong., 1st Sess. 17-18 (1979).

c. Finally, respondent (Br. 79-80, 93-94) and amici Members of Congress (Br. 17-20, 24) contend that the Attorney General's reliance on foreign policy concerns in making discretionary asylum decisions is contrary to the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150. Not so. As the United Nations High Commissioner for Refugees (UNHCR) has explained, "the granting of asylum is not dealt with in the 1951 Convention or the 1967 Protocol." *Handbook on Procedures and Criteria for De-*

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[8] In *American Baptist Churches* v. *Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991), cited by respondent (Br. 97-98) and amici (Members of Cong. Br. 9 n.9; ACLU Br. 3, 27-28; Amnesty Int'l Br. 61-62), the United States entered into a settlement agreement providing that foreign policy considerations are not relevant in determining the factual issue whether an alien has a well-founded fear of persecution. As we explained in our reply brief (at 3-4) at the petition stage, that settlement concerns only the determination of "refugee" status, and therefore *eligibility* for asylum; it does not limit the Attorney General's authority to consider foreign policy in making discretionary decisions whether to *grant* asylum.

termining Refugee Status 7 para. 25 (1988); accord G. Goodwin-Gill, *The Refugee in International Law* 104-105 (1983). Under Article 33 of the Convention, a State may not return an alien to a country where he would be threatened with persecution; the Refugee Act implemented that Article by making withholding of deportation to such a country mandatory under Section 243(h) (with specified exceptions). *Stevic*, 467 U.S. at 421. But the Convention does not adopt any standards or confer any individual rights with respect to the broader relief of asylum. Article 34 does provide that "[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees." However, this provision, which the Court has described as "precatory" and "discretionary," *Cardoza-Fonseca*, 480 U.S. at 441, does not directly concern the admission of or granting of asylum to refugees, which would necessarily precede assimilation and naturalization. Thus, while Section 208(a) may "correspond" to Article 34, *Cardoza-Fonseca*, 480 U.S. at 441, it does not actually implement that Article, much less implicitly incorporate any mandatory duties, standards, or limitations from the Convention.[9]

This conclusion is consistent with the history of asylum in international law and practice. The only "right of asylum" is the right of a State to grant that relief, as an aspect of its territorial sovereignty; there is no recognized right in an individual to receive asylum.

[9] Amici Members of Congress assert that the Conference Report on the Refugee Act states that the asylum and refugee provisions were based "directly upon the language of the Protocol" and are to "be construed consistent with the Protocol." Br. 20 (quoting H.R. Conf. Rep. No. 781, *supra*, at 20). Amici are wrong. The quoted phrases express an intent that the *withholding-of-deportation* provision of the Act be construed consistent with the Protocol. As regards the broader and discretionary relief of asylum, the Report states only that "[t]he Conferees direct the Attorney General to establish a new uniform asylum procedure under the provisions of this legislation." *Ibid.*

Goodwin-Gill, *supra*, at 103-104, 121-122; 1 A. Grahl-Madsen, *The Status of Refugees in International Law* 6, 100-101, 107-109 (1966); INS Br. 25 n.11. Consistent with this view, it has long been understood that "the right of asylum 'is to be exercised by the government in the light of its own interests,'" and each sovereign State is free "to deal with refugees 'as its domestic policy or its international obligations may seem to dictate.'" Goodwin-Gill, *supra*, at 101-102 (quoting 2 *Moore's Digest of International Law* 757 (1906), and 2 *Hackworth's Digest* 622 (1941)). These principles are carried forward in Article I(3) of the U.N. Declaration on Territorial Asylum, adopted by the General Assembly in 1967, which provides that "[i]t shall rest with the State granting asylum to evaluate the grounds for the grant of asylum." G.A. Res. 2312 (XXII) (1967). See Goodwin-Gill, *supra*, at 105-106. There is nothing in the Refugee Act to suggest that Congress intended to depart from these principles. In particular, there is no support in that Act for the extraordinary notion that any consideration of national interest and foreign policy is impermissible.[10]

[10] Respondent and amic rely on the nonideological definition of "refugee" in Article I of the Convention. But as under Section 208(a), there is no inconsistency between that definition's standard of eligibility and the consideration of foreign policy concerns, where relevant, in rendering discretionary asylum decisions. Amici Members of Congress (Br. 17) also rely on Article 3 of the Convention, which provides that "Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion, or country of origin." Because the Convention does not address the granting of asylum, Article 3 has no application here. Moreover, invocation of a general policy of opposing terrorism does not constitute discrimination on the basis of the alien's country of origin. The UNHCR relies (Br. 19-24) on various precatory resolutions and recommendations that States address the refugee problem, but does not argue that the Convention itself actually prohibited the Attorney General from considering cooperation in combatting terrorism or other foreign policy interests. Finally, the fact that the granting of asylum is not an unfriendly act and therefore should not be construed by another State as a censure of its conduct or inter-

B. The Attorney General also did not abuse his discretion in denying the motion to reopen insofar as respondent sought to apply for withholding of deportation. He determined that there were "serious reasons for considering that [respondent] has committed a serious non-political crime outside the United States," and that respondent had participated in persecution of others, and therefore was excluded from eligibility under Section 243(h)(2)(A) and (C). The Attorney General relied on respondent's own admissions about the murder, possession of explosives, and other crimes he committed and his activities as an officer and active leader of the PIRA, which included distributing arms, gathering ammunition, and training and drilling other PIRA members. Pet. App. 83a-90a. Contrary to respondent's contention (Br. 52-79), nothing in the regulations or in *Abudu* (485 U.S. at 104-105) required a different disposition. INS Br. 34-37.[11] Even now, respondent does not point to any factual dispute about his own criminal conduct or involvement with the PIRA.[12] A further hearing at this

ference with its affairs (see UNHCR Br. 22; Int'l Human Rts. Group Br. 27-28) in no way suggests that a State deciding whether to grant asylum may never consider the views of other States.

[11] Amici UNHCR (Br. 10-14) and Amnesty International (Br. 27-49) discuss the provisions of the Convention and UNHCR *Handbook* that address procedures for determining refugee status and eligibility for protection. Here, however, respondent *had* a right to a hearing on asylum and withholding of deportation, but he waived those claims. He now seeks to reopen the proceedings. This Court has already held, in *Abudu*, that the Attorney General has discretion to deny such a motion without affording the alien a hearing on his underlying asylum and withholding claims. That result is both fair and consistent with the Convention. As the UNHCR acknowledges (Br. 11), under the Convention, it is "left to each Contracting State to establish the procedure that it considers most appropriate having regard to its particular constitutional and administrative structure." UNHCR *Handbook* 45 para. 189.

[12] Respondent objects (Br. 67-73, 78) to the Attorney General's reliance on government documentation and the extensive record and findings in *Matter of McMullen*, 19 I. & N. Dec. 90 (1984), aff'd,

late date would serve no purpose.[13]

Respondent's principal objection to the Attorney General's finding of serious reasons to consider that he committed a "non-political" crime is that Judge Sprizzo

788 F.2d 591 (9th Cir. 1986), regarding the PIRA's widespread acts of violence affecting both civilian and military personnel and property, Pet. App. 84a-90a, because that information was not in the record in this case. Respondent ignores the fact that this case does not involve the nature of the record that must be developed in a hearing on an application for withholding of deportation that was timely filed. The Attorney General was not required to conduct a full hearing and develop a full record before deciding even whether to reopen the proceedings. He reasonably could rely on respondent's admissions about his own conduct and on other existing sources for more legislative-type information about the PIRA's activities. That is especially so since a finding of "serious reasons for considering" under Section 243(h)(2)(C) is analogous to a finding of probable cause or reason to believe. See INS Br. 37; *Adams* v. *Baker*, 909 F.2d 643, 648-649 (1st Cir. 1990).

Moreover, respondent admitted at the extradition hearing that the PIRA engaged in extensive acts of violence that resulted in the deaths of numerous civilian and military personnel and destruction of property. See J.A. 143 ("the IRA over the past 15 years have done a very, very heavily [*sic*] bombing campaign"). Although respondent states (Br. 69) that the PIRA's policy was to give advance warning of bombings and other attacks on "economic" targets in order to avoid civilian casualties, he testified that there "has been a number of civilians killed" because of inadequate warnings or other circumstances, and that "this is the fault of the Irish Republican Army." J.A. 139-140, 142, 168. Conduct that consistently exposes civilians to such a serious risk of harm does not fall within any accepted view of protected "political" activity.

[13] Respondent (Br. 75) and amici (UNHCR Br. 18-19; Amnesty Int'l Br. 46 & n.26) contend that the seriousness of respondent's non-political crimes should be weighed against the severity of possible persecution to determine whether he qualifies for relief. The courts have rejected that balancing approach under Section 243(h), holding that an alien is excluded from eligibility if there are serious reasons for considering that he has committed a covered crime. *Ramirez-Ramos* v. *INS*, 814 F.2d 1394, 1397-1398 (9th Cir. 1987); *Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1487 n.10 (11th Cir. 1985). Accordingly, no hearing was required to consider the existence or substantiality of the threat of persecution respondent alleges.

found, in denying the application for extradition in 1984, that the murder and related crimes respondent committed in Belfast in 1980 fell within the exception for "political" crimes in Article V(1)(c)(i) of the 1977 Treaty of Extradition then in effect between the United States and the United Kingdom, 28 U.S.T. 227, T.I.A.S. No. 8468. See Resp. Br. 59-65, 76-77. As we have explained (see pages 8-9, *supra*), however, a denial of extradition does not bar a judge from entertaining a renewed application under the same treaty. *A fortiori*, such a denial does not foreclose the Attorney General from reaching a different conclusion in the exercise of his independent authority under the Immigration and Nationality Act—especially in light of the deference owed the Attorney General's interpretation of the Act under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), and under the text of Section 243(h)(2) that gives critical weight to his characterization of an offense as "non-political." See INS Br. 39-40, 44-45 n.25.

Moreover, since Judge Sprizzo ruled, the United States and United Kingdom have entered into a Supplementary Extradition Treaty under which specified crimes, including murder (one of the crimes of which respondent was convicted), are *not* to be regarded as "offense[s] of a political character." Art. 1(b), S. Exec. Rep. No. 17, 99th Cong., 2d Sess. 15 (1986). That Treaty, which expressly applies retroactively to offenses committed prior to its entering into force, *id.* at 17 (Art. 5), was proposed and ratified with the specific intent of overruling Judge Sprizzo's decision and three other decisions in which extradition of PIRA members was denied because their crimes were found to be "political" offenses under the 1977 Treaty.[14] It rests on a judgment by the political Branches that conditions in Northern Ireland do not

[14] A proposal to make the Supplementary Treaty inapplicable to offenses for which extradition was previously sought—which was specifically intended to exclude respondent from coverage—was rejected by the Senate. 132 Cong. Rec. 16,592-16,600 (1986).

warrant that result because resort to violence is unacceptable in a democratic society; that the declaration that the specified violent crimes are not to be regarded as political offenses conforms to the trend in democratic nations; and that the exclusion of violent crimes from those regarded as "political" will strengthen the credibility of this Nation's opposition to terrorism.[15] Thus, contrary to respondent's contention, the applicable extradition treaty unequivocally supports the Attorney General's finding of "serious reasons for considering" that the murder respondent concededly committed in Belfast in 1980 was a "non-political" crime that excludes him from eligibility for withholding of deportation under Section 243(h)(2)(C).

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed insofar as it sets aside the Attorney General's decision denying respondent's motion to reopen the deportation proceedings, and that decision should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

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[15] See *United States and United Kingdom Supplementary Extradition Treaty: Hearings Before the Senate Comm. on Foreign Relations*, 99th Cong., 1st Sess. 3, 4, 7-8, 10, 14-16, 20, 23, 24, 27-29, 36, 39, 42-44, 49-50, 260-268, 708 (1985); *Supplementary Extradition Treaty Between the United States and the United Kingdom of Great Britain and Northern Ireland: Hearing before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 50-51, 52, 54, 58-59, 62-65, 67-69, 71, 77, 79-80 (1985); 132 Cong. Rec. 16,558 (1986) (Sen. Lugar); *id.* at 16,564-16,566 (reprinting opinion in *In re Requested Extradition of Doherty*); *id.* at 16,586-16,587 (Sen. Lugar); *id.* at 16,588 (Sen. Pell); *id.* at 16,594, 16,595, 16,602 (Sen. Lugar); *id.* at 16,604-16,605 (Sen. Eagleton).

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